SUPREME COURT, U.S.
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No. 00-1573

IN THE

Supreme Court of the United States

ALEX P. MITCHELL,

Petitioner,

v.

NEW YORK BLOOD CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NEW YORK BLOOD CENTER, INC.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the district court abused its discretion in the trial of this employment discrimination claim under Title VII (42 U.S.C. § 2000e-5) in excluding evidence that bore only a tenuous relationship to the motives of the decision-makers, because it related to events that occurred, if at all, several years before the decision at issue and involved persons who were, at most, indirect participants in the challenged decision. The court below held, as has every circuit court that has addressed the issue, that a district court has such discretion, and held that the district court did not abuse that discretion in the particular circumstances of this case.

STATEMENT PURSUANT TO RULE 29.6

Respondent, New York Blood Center, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, §§ 403.02-403.05 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2001) 9

PRELIMINARY STATEMENT

On October 26, 1992, Petitioner Alex Mitchell was instructed to move his car from a reserved parking area to the employee parking area at his workplace at Respondent New York Blood Center, Inc.'s facility in Melville, New York. A white co-worker was also directed to move his car, and did so, but Mitchell repeatedly refused. As a result, he was suspended for the remainder of the shift and told to leave the plant. He refused to leave, however, and for two hours he commandeered the plant, getting into a loud argument with the Vice President who was the head of the division (calling him "Hitler"), and disrupting the operation until the local police came and escorted him from the building.

Upon the intervention of his union, Mitchell was allowed to return to work, pending a full investigation. Within two weeks, the Manager of Human Resources for the division had met with Mitchell and his union representatives and had interviewed the witnesses to the events of that day, including the witnesses identified by Mitchell. She reported her findings to the Blood Center's Vice President for Human Resources and the head of the division; the three managers concluded that Mitchell had engaged in gross insubordination and discharged him.

Mitchell's union filed a grievance challenging the discharge under the collective bargaining agreement's just cause standard. The matter was submitted to arbitration before an impartial arbitrator (a former president of the American Academy of Arbitrators) who held a hearing, at which Mitchell was represented by counsel provided by his

union and at which he and representatives of management testified and were cross-examined. The arbitrator ruled that the Blood Center had just cause to terminate Mitchell's employment.

Mitchell also filed an unfair labor practice charge with the National Labor Relations Board, asserting that he had been unlawfully discharged in retaliation for having engaged in activities on behalf of the union in his capacity as a union delegate (a position analogous to a shop steward). After investigation, the Labor Board dismissed the charge.

Mitchell also filed this lawsuit, asserting that he had really been discharged because of his race and national origin.[1] At trial, he testified to his version of the events leading to his discharge, as well as prior encounters with the managers who had instructed him to move his car that he asserted were demonstrative of discriminatory *animus*. He was also permitted to introduce evidence of white employees who had engaged in allegedly similar conduct and had not been discharged.

The district court refused to allow Mitchell to call as witnesses several disgruntled former Blood Center employees, who would have testified to events allegedly occurring some three to ten years before the events leading to Mitchell's termination, which supposedly demonstrated that they had been discriminated against by the Blood Center in their own situations. Also excluded were the personnel files of several white employees who had committed various infractions but not gross insubordination, and who had not been discharged for their misconduct.

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1. The national origin claim was later dropped.

The court below held that the district court had not abused its discretion in ruling this evidence inadmissible. In his zeal to obtain review of this decision, Mitchell has fabricated an alleged conflict in the circuits, where none exists. Without exception, the circuit courts have held that the district courts have the discretion to exclude evidence of alleged remarks or events so remote in time or otherwise attenuated that their probative value in ascertaining the motives of the persons making the decision being challenged is outweighed by the unfair prejudice to the employer.

As Mitchell has not identified any basis for this Court to review the decision below, the Petition should be denied.

COUNTERSTATEMENT OF FACTS

Petitioner, Alex P. Mitchell, was hired in 1988 by Respondent New York Blood Center, Inc. (the "Blood Center") at its manufacturing division, known as "Melville Biologics."[2] During Mitchell's employment at the Blood Center, the Melville Biologics Division had two parking lots. One small lot, with approximately 14 spaces, was located near the front entrance of the facility. The spaces in this lot were reserved for use by handicapped drivers and, during business hours, by visitors and some executives. The larger main parking lot, with 200 spaces, was located behind the building and designated for use by the facility's employees.

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2. The Blood Center is a New York not-for-profit corporation that serves as a central blood bank for about 200 hospitals in the metropolitan New York City area. Melville Biologics was a commercial division that manufactured certain pharmaceutical products from frozen blood plasma. For a number of reasons, the division lost money and was closed in 1994.

As established by his own trial testimony, Mitchell knew that the front lot was not available to employees during regular business hours. Nevertheless, on the afternoon of October 26, 1992, he parked his car in the reserved lot. Russell Clarke, the Facilities Manager (in the presence of Gary Swan, Manager of Production, which was the department in which Mitchell worked) asked Mitchell to move his car to the employee parking lot. Mitchell testified that he refused, and told Clarke that he (Clarke) could move the car himself, but that Clarke would be responsible for anything that might happen to it.

Clarke then specifically instructed Mitchell to move his car. Mitchell still refused, and Clarke told him that he was suspended for the rest of the shift and to leave the facility. Instead of leaving the premises as directed, Mitchell went back into the production area, then back out of the production area, then to the reception area, then to the employee dining area, then to the office area. Along the way, he got into a shouting confrontation with the head of the division, calling him "Hitler." As he traipsed around the building, he was asked repeatedly where he was going, but he refused to say. Although he testified that it was always his intention to leave peacefully, he admitted that he never told anyone that he would comply with the directive to leave the premises and, indeed, challenged management to physically remove him. Even though he was told that the police would be summoned to remove him, he still did not leave until the police actually came and escorted him from the premises. According to Mitchell, this incident lasted for about two hours.

Subsequently, Linda Amper, the Manager of Human Resources for the Melville Biologics Division, conducted an investigation of the events on October 26, 1992. Amper

met with Mitchell and his union representatives, the managers involved in the incident, and the employees identified by Mitchell and the union as witnesses. At the conclusion of her investigation, Amper conferred with the head of the division and the Blood Center's Vice President for Human Resources as to the appropriate discipline to be imposed. They concluded that Mitchell's conduct constituted gross insubordination and that dismissal was appropriate. Clarke and Swan were not consulted with respect to the appropriate discipline.

OPINIONS BELOW

Prior to trial, the district court repeatedly asked Mitchell to identify any evidence he had to support his contention that the persons who had decided to discharge him had been motivated to do so because of his race; for example, evidence that the decision-makers had expressed hostility to his race, had treated Mitchell differently from similarly situated white employees, had acted inconsistently, or had otherwise proffered a reason for their actions that was a pretext for discrimination.

Mitchell, however, could not produce such evidence. Instead, he proffered to the district court a parade of disgruntled former employees, each with his own personal story of how he had allegedly been discriminated against in his own employment situation, unconnected in time or substance to the decision to discharge Alex Mitchell. The district court held pursuant to Rule 403 of the Federal Rules of Evidence that such evidence was not admissible, because it was too remote in time, did not relate to the persons who had made the decision to terminate Mitchell, and would confuse the jury with lengthy and complex mini-trials of the claims of the various witnesses.

Mitchell was permitted to testify concerning his version of the events leading up to his discharge, and to a prior encounter he had had with Messrs. Clarke and Swan (the managers who had told him to move his car).[3] At the conclusion of Plaintiff's evidence, the district court granted the Blood Center's motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. Applying the familiar *McDonnell Douglas* burden-shifting analysis,[4] the district court held that Mitchell had not established the elements of a *prima facie* case of discrimination, and, even if he had, he had produced no evidence from which a reasonable jury could infer that the Blood Center's proffered reason for the termination of Mitchell's employment — gross insubordination — was a pretext for discrimination.

On appeal, Mitchell renewed his contention that all his proffered evidence should have been admitted. The Court of Appeals for the Second Circuit held that the district court had acted within its discretion in its evidentiary rulings. In an unpublished summary order, the court carefully avoided any sweeping pronouncement and confined the decision to the facts of this case. In particular, the court noted that

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3. Mitchell testified that some eight months before the incident, Clarke had told him not to go through the engineering department as a shortcut to enter and exit the facility. Mitchell testified that he viewed this instruction as an example of Clarke's racism, even though he was aware that a white employee had been fired for stealing from the engineering department and did not know whether white employees had been given the same instruction. Mitchell further testified that Swan's racism was apparent from his failure to prevent Clarke from giving this instruction.

4. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

evidence of alleged discriminatory *animus* involving indirect participants in a challenged employment decision, such as Messrs. Clarke and Swan, might be admissible in some cases. In this case, however, the court determined that there was no "need to decide whether in certain circumstances similar evidence that relates to the attitudes of non-decision-makers at the time of a firing should be admitted." (App. to Pet. for Cert. at 7a) This was so, the court held, because "in the case before us, the testimony proffered concerns remote statements. And that remoteness in time, combined with the, at most, attenuated influence on the decision by the alleged biased persons, is certainly sufficient to justify the court's exercise of discretion." *Id.*

Similarly, the Second Circuit affirmed the district court's decision to exclude the disciplinary records of other employees, on the grounds that "[t]he difference between Mitchell's behavior and that of the employees disciplined in the proffered documents is significant enough that we cannot say that the court erred in finding the employees not similarly situated." *Id.* at 8a. Finally, the court of appeals affirmed the district court's conclusion that Mitchell had failed to establish a triable issue with respect to the question of whether the Blood Center's articulated reason for his termination — Mitchell's gross insubordination in his prolonged confrontation with management on October 26 — constituted a pretext for discrimination. "Where a nonpretextual explanation is given," the court held, "a discrimination action will not lie." *Id.* at 9a (citing *McDonnell Douglas*, 411 U.S. at 806).

REASONS FOR DENYING THE WRIT

THERE IS NO CONFLICT AMONG THE CIRCUITS; THE LEGAL STANDARD APPLIED BY THE SECOND CIRCUIT IS THE SAME AS THAT APPLIED BY OTHER CIRCUITS

Mitchell asserts two grounds for granting a writ of *certiorari*. First, he asserts that all courts of appeals except the Second Circuit have adopted the "fruit of the poisonous tree" doctrine which supposedly holds that "a jury may find that a racial taint at any step in the adverse employment decision is sufficient to hold the employer liable for employment discrimination." Pet. for Cert. at 17. Mitchell declares that the Second Circuit in the decision below rejected this doctrine. *Id.* The court below, however, did no such thing.

Mitchell also asserts that the legal standard applied by other circuit courts of appeals permits evidence of allegedly discriminatory remarks or conduct to be admitted no matter how large the time period or tenuous the logical connection between the alleged remark or event and the challenged decision. *Id.* at 19. According to Mitchell, only the Second Circuit bars evidence based on its remoteness. Not surprisingly, the circuits have adopted no such rule.

In ruling on the admissibility of evidence, all federal courts begin with the rule of evidence that admissible evidence must be probative, that is, it must tend to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence that has some probative value should be excluded, however, "if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. Decisions on the admissibility of evidence are committed to the broad discretion of the trial court and will be reversed only upon a showing that the trial judge's ruling shows an abuse of discretion. *See generally* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, §§ 403.02-403.05 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2001).

As the Second Circuit did in the case below, the other circuit courts also consistently hold that evidence may be excluded because it is too remote or attenuated from the challenged decision.[5] *See, e.g.*, *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990) ("[t]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case"); *Ezold v. Wolf, Block, Shorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992) (affirming exclusion of alleged discriminatory remarks on the grounds they were not made by someone who influenced the decision-making process), *cert. denied*, 510 U.S. 826 (1993); *Equal Employment Opportunity Comm'n v. Clay Printing Co.*, 955 F.2d 936, 941-42 (4th Cir. 1992) (alleged discriminatory remarks were not evidence of bias because

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5. The unfair prejudice and risk of confusion from such evidence are manifest. Allegations concerning remarks that were supposedly made many years before the challenged event can be very difficult to refute, as memories fade and witnesses become unavailable. Allegations that decisions made years earlier were themselves discriminatory can raise the same issues, and can also bog the trial down in a series of mini-trials to ascertain whether those earlier events actually occurred as alleged and whether they were themselves the product of discrimination, without materially assisting the jury in deciding the case actually before it.

they were not directly related to any particular person or the employment decision at issue); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (if the decision-maker based his decision on his own independent investigation, the causal link between the allegedly biased supervisors who recommended termination and the decision to terminate would be broken); *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir.) (decisions made independently by separate decision-makers were irrelevant, and biased comments allegedly made a year earlier were not probative of discriminatory motive), *cert. denied*, 510 U.S. 861 (1993); *Dupre v. Fru-Con Eng'g Inc.*, 112 F.3d 329, 337 (8th Cir. 1997) (it was not an abuse of discretion to exclude evidence of allegedly discriminatory remarks that were not made by decision-maker); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (biased comments were irrelevant because they were not tied to plaintiff's termination); *DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 879 F.2d 459, 467 (9th Cir. 1989) (biased comments made by someone who did not terminate plaintiff were insufficient evidence of employer's discriminatory motive); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (there must be a nexus between the allegedly discriminatory comments and the decision to terminate plaintiff).

Far from adopting a blanket rule that all evidence must always be admitted, the courts of appeals follow the guidance of Fed. R. Evid. 403 and balance the probative value of proffered evidence against its likely prejudicial effect. Mitchell relies on cases in which the circuit courts held that evidence of alleged discriminatory conduct was admissible because there was sufficient basis for connecting the alleged bias to the ultimate decision being challenged, but these cases do not adopt a general rule that all evidence must be admitted.

For example, in *Equal Employment Opportunity Commission v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995), a case relied upon by Mitchell, the district court excluded evidence of age-related remarks allegedly made by the district manager over a four-year period. The district manager described plaintiff as an "old man" and "old and inflexible." *Id.* at 1094-95. The district manager recommended to plaintiff's supervisor that one of two sales positions be eliminated. He further recommended that plaintiff be terminated and the other sales person, whom he described as a "young aggressive sales rep," remain. *Id.* at 1091. The supervisor did not make an independent determination of which position should be eliminated; instead, he relied upon the recommendation by the district manager and fired plaintiff. On these facts, the Fifth Circuit held that the excluded evidence should have been admitted since the district manager was a "significant participant" in the decision to terminate plaintiff, and the employer failed to show that the excluded evidence would create unfair prejudice or confusion. *Id.* at 1094.

Similarly, Mitchell's reliance on *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987), does not advance his position. In *Conway*, as in *Manville*, there was a nexus between the evidence of alleged discrimination and the ultimate decision to terminate plaintiff. The First Circuit Court of Appeals held in *Conway* that it was not an abuse of discretion to admit evidence of a discriminatory remark made eight months earlier by a supervisor closely involved in the decision to discharge the plaintiff. Nor was it an abuse of discretion to admit evidence of a discriminatory remark made ten to twenty-two months earlier by the company's president who was in a position to veto the decision to terminate plaintiff but did not do so despite her pleas. Thus, the *Conway*

court held that the evidence before it was not too remote from the events and individuals involved in the decision to fire plaintiff. Accordingly, on the facts before it, the First Circuit held that the district court judge did not abuse his discretion in permitting testimony about the alleged discriminatory remarks by persons involved in the decision-making process. The *Conway* court recognized, however, that in some cases the relationship between the evidence offered to demonstrate a corporate state-of-mind and the alleged discriminatory employment actions at issue might be too attenuated and would then be inadmissible. *Id.* at 598.

Other cases relied upon by Mitchell also stand for the proposition that admissible evidence must have sufficient nexus to the employment decision at issue. *See, e.g.*, *Haas v. Advo Sys., Inc.*, 168 F.3d 732, 733-34 (5th Cir. 1999) (reversing grant of summary judgment on grounds it was unreasonable to infer that recommendation not to hire plaintiff was free of discriminatory taint where alleged discriminatory remarks were related to the protected characteristic, proximate in time to the decision, made by an individual who influenced the decision and related to the decision); *Shager v. Upjohn Co.*, 913 F.2d 398, 402-03 (7th Cir. 1990) (reversing grant of summary judgment where there were discriminatory comments by supervisor who made excuses for younger salesperson's performance but not for plaintiff's and recommended that plaintiff be terminated); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 734 (3d Cir. 1988) (evidence of biased comments in tenure process were relevant because each successive decision-maker had before it the reports and recommendations of prior levels and hence the biased comments could infect the entire process with discrimination).

Mitchell's reliance on *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648 (11th Cir. 1993), *cert. denied*, 513 U.S. 814 (1994), is particularly misplaced. In *Ross*, the court affirmed the district court's *exclusion* of evidence that three to five years earlier, while at another facility, managers made racist comments. Plaintiffs argued on appeal that the excluded evidence would have shown there was discriminatory *animus* at the facility at which plaintiff worked. The district court determined the proffered evidence of discriminatory *animus* would unnecessarily prolong the trial and require a trial within the trial regarding activity at another facility that was not at issue. The Eleventh Circuit held that although the alleged comments had probative value, it was not an abuse of discretion under Fed. R. Evid. 403 to exclude the evidence because of the potential for prejudice. Similarly, the evidence proffered by Mitchell would have opened the door to trials within the trial concerning alleged discrimination remote in time and unconnected to the decision to terminate Mitchell. The Second Circuit, as did the Eleventh Circuit, held that it was not an abuse of discretion to exclude such evidence.

In sum, the circuit courts agree that evidence that is too remote in time or causal connection to the challenged decision may be excluded, and that the evidentiary rulings of the district court are reviewed for an abuse of discretion. As Mitchell has failed to establish any conflict among the circuit courts of appeals, there is no need for this Court to review the decision below.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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